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UNITED STATES SUPREME COURT
OCTOBER, 1990 TERM

QUALITY TECHNOLOGY COMPANY

Plaintiff-Appellant

VS.

STONE & WEBSTER ENGINEERING COMPANY, INC.; STEMAR CORPORATION; BETA, INC.; and STEVEN A. WHITE

Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Can the well-established case law for determining when an independent contractor is entitled to claim governmental immunity as set forth in this Court's decisions of Yearsley v. W.A. Ross Construction Company, 309 U.S. 18 (1940) and Boyle v. United Technologies Corp. 487 U.S. 500(1988) be ignored simply because at some point in the course of a wrongful conspiracy one of the contractors was given the power by a government agency, without the specific authorization of Congress, to "act like" a federal employee and exercise the discretion of the government while still retaining his separate identity and the benefits of being an independent government contractor?

II.

Can an independent contractor claim official immunity for discretionary acts performed under a contract with a government agency that is in violation of 18 U.S.C. §208(a) when the acts complained of are the specific acts that violate §208(a)?

III.

Can the lower court depart from established precedent and grant qualified immunity to all defendants when there is evidence the defendants terminated plaintiff's employment for pretextual reasons and by a method of publicly disseminating false information about the plaintiff in connection with the termination from government employment that has resulted in injury to the plaintiff?

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None of the decisions, orders or opinions issued in this case by any of the courts below have been published.

GROUNDS FOR JURISDICTION

Plaintiff's action was dismissed by the United States District Court for the Eastern District of Tennessee on March 27, 1989 on a finding that all of the defendants were entitled to claim the immunity of a government official as a bar to all claims by the plaintiff. Plaintiff's Motion for Reconsideration was denied June 1, 1989, and appeal was taken. The Court of Appeals for the Sixth Circuit affirmed per curium the District Court on August 2, 1990, with adoption of the written opinion of the trial court and a rehearing was denied on October 19, 1990.

Appeal is now sought on a writ of certiorari pursuant to 28 U.S.C. §1254(1) for the following reasons:

(a) A grant of official immunity to government contractors who are exercising their own discretion, without specific congressional authority to so do, is in conflict with applicable decisions of this court.

(b) The grant of both absolute and qualified immunity to all defendants to this action is such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATUTES INVOLVED

The impact of engaging in activity that violates the federal conflict of

interest statute on the ability to claim the immunity of a government official for acts that are the very type of activity that violates 18 U.S.C. §208(a) is at issue in this case. The full text of the statute is produced in the Appendix.

STATEMENT OF THE CASE

The plaintiff Quality Technology Company, commonly referred to as QTC, is a company that was contracted with in April, 1985 by the Tennessee Valley Authority (TVA) to provide expertise and personnel to establish and operate a confidential program whereby employees at the Watts Bar Nuclear Plant could express concerns about the safety of the plant and receive feedback on the corrective action taken without fear of losing their jobs. TVA employees had been reporting safety concerns directly to the NRC and to members of Congress as licensing for the plant

approached and indicated they were unwilling to report safety violations through channels at TVA for fear of retaliation. After competitive bidding, QTC was given a contract in April 1985 to establish a confidential program for the expression and investigation of employees' safety concerns. (J.A. 1802)[1] This program was called the Employee Response Team (ERT) and operated under specific procedures (J.A. 1764) at the Watts Bar facility. Many more safety concerns were expressed through the ERT program than either QTC or

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[1] References designated "J.A." are to the page or volume number of the Joint Appendix filed with the Sixth Circuit Court of Appeals, an eleven volume document that Petitioner has or will request be certified to this Court. For references to portions of depositions or specific pages of a deposition exhibit, the J.A. reference is to the first page of that exhibit or that witness testimony as it is given in the cross-reference table of the Joint Appendix, but the page numbers after the exhibit number or witnesses name refers to the specific pages of the deposition or exhibit.

TVA had expected and the contract was supplemented as needed to allow for the additional manpower and funds required. (J.A. 1802, 1820, 1822). The plaintiff also entered into a separate contract with TVA to assist TVA in establishing its own agency-wide and TVA-run Employee Concern Program (ECP) as a means to avoid the problems that led to the need for the ERT and that led to so many concerns being expressed at one time. Work under the ECP contract began in November, 1985, but the contract for QTC's services in the ECP program was not signed until January 10, 1986. (J.A. 1876).

The large number of safety concerns being reported at TVA was causing increased scrutiny by the NRC at other nuclear plants around the country and otherwise causing difficulties for defendant Stone and Webster Engineering Company, Inc. and other

contractors who supplied services to "troubled" nuclear plants in the private sector. (J.A. 1341 Sisken pp. 52-55, 58-59, 110-111) In the late summer or early fall of 1985 the defendants embarked on an effort to obtain management control of TVA's nuclear program and plaintiff alleges also entered into a conspiracy to achieve that goal in part to silence the reporting of nuclear safety issues and also to put QTC, and the competitive approach to problem solving at troubled nuclear plants that QTC represented, out of business.

On January 13, 1986, Steven White assumed the duties of the Manager of the Office of Nuclear Power (ONP) pursuant to a series of contracts by and between the defendants in this action and TVA. Under a contract between TVA and defendants Stone & Webster Engineering (SWEC), the services of White and twelve other persons would be

persons would be supplied to SWEC by defendant STEMAR (a corporation owned by Steven White and his wife) with the five persons being White and the four principles of defendant BETA -- William Wegner, Robert Brodsky, William Bass and Murray Miles. STEMAR would also charge SWEC (and ultimately TVA) an additional 10% "administration fee" for all services provided by BETA (J.A. 1952 Ex. 56 I.G. Report pp. 61,84). The contracts under which Steven White assumed the power and authority of the manager of ONP were clearly in violation of the conflict of interest provisions of 18 U.S.C. §208(a) since White was in a position to order services from his own employer (SWEC) and also to receive a 10% fee for every hour of service he ordered from BETA. The violation was one that specifically

impacted QTC. Under the contract for his services White was given the unfettered power to hire and fire any TVA contractor providing services to ONP, and he did fire QTC and give the resulting work to SWEC and BETA to perform.

QTC was notified within days of White's arrival on the scene that TVA no longer needed QTC's services in the ECP program (J.A. 2132) and that QTC's duties in the ERT program were to be reduced dramatically. (J.A. 2064). The elimination of QTC's involvement in the ERT created a gap in the flow of information that required an entirely new approach be developed for concluding the "resolution" of outstanding employee concerns. Although unknown to the public or to QTC at the time, a number of SWEC and BETA personnel were assigned to the "restructuring" of both the ERT and ECP programs immediately

upon their arrival at TVA. (J.A. 1367 Siskin pp. 167-168, 179-180, 197-199; J.A. 1145 Drotleff p. 25; J.A. 986 Brodsky pp. 100-105) All QTC personnel had left the Watts Bar facility entirely by April 1986, and except for completion of contracts entered into before April 1986, QTC has not been able to obtain employment with any other utility since its termination from TVA. (J.A. 163)

Plaintiff originally filed suit in January 1987 in the Circuit Court of Hamilton County, Tennessee, but the case was removed by the diverse defendants pursuant to 28 U.S.C. §1441. (R2 Petition for Removal)[2] Plaintiff has claimed damages against these defendants for

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[2] References indicated as "R" are to the record entry on the docket sheet of the Eastern District of Tennessee. The complete record was never filed with the Court of Appeals because of its bulk and has remained with the District Court Clerk.

tortious interference with plaintiff's contracts with TVA under T.C.A. §47-50-109, for tortious interference with plaintiff's ongoing business relationship with TVA for trade disparagement and, alternatively, for a constitutional tort.

On January 19, 1988, defendants filed a Motion to Dismiss or in the Alternative for Summary Judgment (R 31) asserting for the first time that the defendants were entitled to claim the absolute and qualified immunity of a government official. Defendants' motion was granted on March 27, 1989, and plaintiff has appealed.

While there are specific factual matters that are hotly disputed between plaintiff and defendants there is ample evidence in the record from which reasonable inferences can be drawn to support plaintiff's view of the facts

presented in this action.[3] On the defendants' motion the plaintiff is entitled to have all disputed facts construed in the light most favorable to the plaintiff. The facts of this case, when viewed in a light most favorable to the plaintiff, show a conspiracy between

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[3] Despite difficulties encountered in obtaining discovery from the defendants the record in this case is voluminous, even as narrowed by the Joint Appendix filed in the Court of Appeals. The factual basis for plaintiff's view of this case is set forth in much greater detail with specific citation to the record in Appellants Brief filed in the Court of Appeals at pp. 10-34 wherein the details of events and contracts between plaintiffs and TVA, defendants and TVA and ultimately the conduct of the defendants to the plaintiff is set forth with greater specificity. Space limitations on this Petition do not allow for an extensive review of factual matters, but if the Court wishes more factual detail for a grant of certiorari, the record is available from the Court of Appeals. The issues presented for review may be determined, however, on the assumption that factual matters alleged by the plaintiff can be proved at trial.

the defendants that began in the Fall of 1985 and which had the following goals:

1. to run QTC off from TVA and shut down the ERT program so the problems with nuclear safety issues being found at the Watts Bar facility could be covered up and the NRC would also ease up on inspections at other plants with which the defendants were involved.
2. to put QTC and its competitive approach to problem solving for the industry out of business.
3. to have the nuclear power program at TVA turned over to SWEC to operate through a series of contracts under which SWEC's agents were placed in control of the management decisions to be made in TVA's nuclear program and

who could then contract with SWEC for more services.

Goal 3 was, of course, the most obviously beneficial to defendants, but it was also the means by which goals 1 and 2 could be most effectively achieved.

The arrangement sought under goal 3 was also a violation of 18 U.S.C. §208(a) and the benefits obtained thereunder were a fraud upon the government. But, these defendants also included in their conspirational plans the means of shielding themselves from criminal liability by obtaining specious determinations under 208(b) from the TVA Board of Directors that were obtained by giving false information to the TVA Board. (R. 123 Affidavit of Donna Keene Holt with attachments). The defendants then proceeded to enrich themselves by millions and millions of dollars in contracts with TVA, and at least

some as yet unknown portion of that $189 million in contracts was for work previously performed by QTC, or work required as a direct result of the termination of QTC.

The illegality of the contracts for White's services appears to have led to the resignation of one of the Directors of the Board of TVA[4] and placed the defendants in

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[4] It seems more than coincidence that Director Freeman's resignation on February 13, 1986, coincides with Mr. Sanger's first published memo addressed to the contracts situation that was dated and distributed February 13, 1986, in connection with the request for 208(b) determinations from the Board for high-ranking SWEC officers (with large holdings in SWEC stock and other financial interests in SWEC) that White wanted to place in four more line management positions at TVA. The day after Director Freeman's resignation the two remaining directors issued the requested 208(b) determination. It should also be noted that these documents indicate an outside estimate of the cost of the services TVA expected it would be obtaining from SWEC on personal services contracts (including the contract for White's services) to be around $16 million. The Board's reasoning for the 208(b) determination was that 16 million was minimal

direct conflict with Herbert Sanger, General Counsel for TVA and also chief ethics officer of the agency.[5] The U.S. Comptroller General issued an opinion June 2, 1986, finding that because the terms of the MOU (Memorandum of Understanding) with TVA vested in Mr. White functions normally performed by a government employee, this rendered the contract for his services an improper personal services contract. As stated in the opinion, "TVA may not avoid the statutory salary limitations by contracting out functions normally

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in comparison to SWEC's $2 billion in annual revenues. The $2 billion figure supplied by SWEC proves to be false, however, with actual revenues more in the range of 200-400 million.

[5] The ongoing "chronology" included in the Congressional hearings of September 29/30, 1986, held to investigate the lack of support for ethics officers who report violations, outlines the ongoing dispute over the conflict of interest issue between defendants and Mr. Sanger (J.A. 861) as well as disagreement between defendants and the Office of General Counsel regarding the termination of QTC.

performed by TVA employees, absent a specific Congressional authorization" 486 FPBR 1087 at p. X1 - 492. TVA hired independent counsel to render an opinion. While the "Strauss Report" (J.A. 2153) disagreed with the GAO conclusions on whether a contract arrangement for a line manager was in itself an improper personal services contract, this legal opinion had to concede that the activities of the defendants and their employees fell squarely within the prohibitions of 18 U.S.C. §208 (a). The opinion further states, however, that there was no "violation" of 208(a) by the defendants because the defendants did obtain 208(b) determinations from the TVA Board, and were, therefore, shielded from criminal liabilty despite having acted in a manner clearly prohibited by 208(a). Finally, the Inspector General of TVA also issued a

report (J.A. 1952-2046) concluding that the contract arrangements created a conflict of interest. In the face of this much public acknowledgement that the federal conflict of interest laws were being violated, the defendants "temporarily resigned" their positions at TVA in October 1986 until the contacts were "restructured." White and agents of the other defendants returned to their line management positions with TVA in January 1987. By the time White left TVA in 1988 SWEC had obtained almost 200 million in contracts from TVA.

Under these facts the grant of the sovereign benefit of governmental immunity cannot be justified. For a court to allow immunity under these circumstances would be tantamount to ruling that it is all right to conspire to put someone out of business as long as the conspiracy is successful and you can place one of the conspirators in

the position of authority needed to complete the job -- and, likewise, it is all right to conspire to violate 208(a) as long as the conspiracy is successful, the conspirators avoid criminal prosecution, and the only one objecting is not the government, but only some victim directly affected by the unlawful acts prohibited by 208(a). To allow a grant of immunity to stand in this case is also to ignore a very well-established body of case law and the previous decisions of this Court as to the criterion to be use for determining when a government contractor may or may not claim governmental immunity.

I.

THE DEFENDANTS ARE NOT ENTITLED TO CLAIM THE IMMUNITY FASHIONED FOR THE PROTECTION OF CIVIL SERVANTS

A. The status of Steven White as an independent contractor cannot be ignored simply because he was allowed to "act like" a federal employee.

The lower courts erred in treating defendant White as though he were a federal employee without examining the facts of this case in light of the applicable law. Mr. White was not a federal employee and went to great lengths to establish that fact to avoid any ramifications to the federal pay cap on the $29,600.00 per month payment ($355,200 per year) he received for his services as the Manager of ONP.

Neither did Mr. White become a "federal employee" simply by assuming his position on January 13. Mr. White has gone to great lengths to establish that he is an Independent Contractor and not a federal

employee of any kind. As set out in the January 7, 1987 contract between TVA and STEMAR (J.A. 1937) it was specified that STEMAR is an independent contractor and that nothing in the contracts shall be deemed to create an employer-employee or agent-principal relationship between TVA and STEMAR. The verbal assurances White demanded at the time he entered the January 1987 contract were included as specific written provisions in the "restructured" contracts that were signed in 1987.

The 1987 contract demands delivery of a legal opinion from TVA counsel to the effect that providing Mr. White's services as Senior Manager "...shall not result in the Senior Manager's being a 'regular officer or employee' of TVA within the meaning of 16 U.S.C. §831b or a 'special Government employee' within the meaning of 18 U.S.C. §202." The contract also demands

delivery of an advisory opinion from the Department of Navy Judge Advocate General confirming that the compensation restriction set forth in the Dual Compensation Act (5 U.S.C. §5532 et seq) does not apply to Mr. White.

Mr. White was most decidedly not a federal employee. The lower courts erroneously assumed that only the employment function was controlling and that White's employment status has no bearing on the issues. In all of the cases relied on by the trial court for granting immunity, however, the individual defendants were unquestionably federal employees or "special employees." Such is not the case for Mr. White. His status as an independent contractor cannot be ignored nor can the significant body of case law on this issue. White can claim the immunity granted to government employees only if he

can show that he falls into that category of cases in which a public contractor is allowed to share the immunity of the public body with which he has contracted.

The general rule has long been that a public contractor is entitled to share the immunity granted to the public body with which he contracts only if the activity complained of was required by the government, but not when the activity was discretionary with the contractor. See generally, Annot. 9 A.L.R. 3d 382 (1966). Tennessee case law illustrates the general rule. In Trigg v. H.K. Ferguson Co., 209 S.W. 2d 525 (TN. App. 1947), the court did not allow the defendant's claim of immunity for injuries arising from negligent marking of a highway that was under construction by the defendant pursuant to a contract with the Federal Government for construction of a war plant, including necessary roads.

The defendant contended that because the government entity (the Army) approved the plans and specification as designed by the defendants, they should be entitled to immunity for following approved specification. The Court found as dispositive, however, that:

> [n]o agency of the government made or furnished to the defendants any plans or specifications for the highways, or directed their location. Upon the contrary, according to the evidence so far, the highway system was wholly the design of the defendant's engineers, apparently what they conceived to be necessary for a complete plant of the kind they agreed to build. Id. at 530.

The rule is no different for federal contractors. In performing work required for redirecting the Mississippi River, the contractor was held immune from responding in damages to injured property owners because the work done was authorized and directed by the government. Yearsley v. W.A. Ross Const. Co., 309 U.S. 18, 60 S.

Ct. 413, 84 L.Ed. 554 (1940). See also in accord, In re "Agent Orange" Product Liabilty Litigation, 506 F. Supp. 762, 792-94 (E.D.N.Y.), rev'd on other grounds, 635 F.2d 987 (2nd Cir. 1980) cert. denied, 454 U.S. 1128, (1981).

Whether the claim is for damages to property resulting from redirecting highways and rivers or for damages to reputation or business from mis-representations or derogatory statements, the rule is the same. The contractor is entitled to claim immunity only when the actions complained of were required by the government. For instance, in Becker v. Philco, 372 F.2d 771 (4th Cir. 1967), the defendant was immune from the plaintiff's damages action for defamation because the defendant was required under its contract with the government to report any suspected compromise of the security system. As the

Court stated, "...the company has no discretion and is mandatorily ordered to report the suspicion immediately." Id. at 774. In Blum v. Campbell, 355 F. Supp. 1220 (D.C. Md. 1972) the manager of an apartment complex under contract to the FHA was deemed entitled to official immunity from a defamation action because the FHA closely supervised the day-to-day activities of the company and the company simply carried out FHA instructions. The defendants, therefore, "were acting as agents under the direct supervision and control of the FHA and not as independent contractors." Id. at 1224. In Bushman v. Seiler, 755 F. 2d 652 (8th Cir. 1985) the report of a podiatrist consultant for Medicare intermediary was the result of an audit conducted pursuant to 42 C.F.R. §421.200(e) and was intended for internal use only, and, therefore, the defendants

were allowed to claim official immunity to tne plaintiff's libel and slander action. After collecting and reviewing cases on the subject, the court in Group Health, Inc. v. Blue Cross Ass'n., 625 F. Supp.69 (S.D.N.Y. 1985) concluded:

> Turning to the facts of this case, it is apparent that the defendants cannot be considered government officials. The conduct complained of was not undertaken at the instigation and direction of the government. To the contrary, Blue Cross acted wholly on its own, without direction or guidance from HHS. Although 42 C.F.R. §421.5(b) provides that intermediaries act on behalf of HHS, that regulation does not elevate the intermediaries to the status of government officials so that they would be immune for their own tortious conduct. Id. at 78.

Simply acting on behalf of a government entity is not sufficient if the independent contractor is exercising his own discretion with regard to the complained of action. As demonstrated above, it is not just Tennessee state courts that have long made a distinction between a contractor who

exercises discretion and one who is simply carrying out the direction of the government. The United States Supreme Court has also long found the distinction to be one of importance. Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940). Whether the contractor exercises any degree of discretion became the point of departure between the majority and the dissent in the latest Supreme Court opinion on the subject. In Boyle v. United Technologies Corp., 487 U.S. 500 (1988) a five to four majority allowed a claim of governmental immunity as a bar to a products liability action based on design defect against the manufacturer of a military helicopter because the United States approved reasonably precise specifications and the equipment conformed to those specifications. The dissent would not have allowed immunity because the manufacturer

was not following minutely the government's own in-house specification, but apparently had some input in the preparation of the manufacturing plans. The dissenters apparently viewed any participation by the contractor in the preparation of the plans as an exercise of discretion that would prohibit the use of the immunity defense. As Justice Brennan stated:

> ...In other words, unlike respondent here, the contractor in Yearsley was following, not formulating, the Government's specifications....Had respondent merely manufactured the CH-53D helicopter, following minutely the Government's own in-house specifications, it would be analogous to the contractor in Yearsley, although still not analytically identical....But respondent's participation in the helicopter's design distinguishes this case from Yearsely, which has never been read to immunize the discretionary acts of those who perform service contracts for the Government. Id at 525
>
> (emphasis added)

Under the tests announced by either the majority or the minority opinions in Boyle,

Steven White would not be entitled to claim governmental immunity in this case.

In the case at bar, these defendants are not in a position to contend that Mr. White's actions were made under the direct supervision and control of any TVA employee. Mr. C.H. Dean was Chairman of the Board of Directors at all times pertinent to this action and it is clear from his testimony that Mr. White was functioning as an independent contractor in every sense of the term. (J.A. 1090 Dean pp. 51-54). With respect to the termination of QTC, Mr. White made the appearance of obtaining approval from the Board but actually acted before any approval was given. (J.A. Dean 1098 pp. 40-41; J.A. 1157 Freeman pp. 41-42).

Mr. White has jealously guarded his status as an independent contractor in any interpretation of his statutes that could

lower the financial rewards he receives for his services. He demanded and got total independence in the management decisions related to the hiring and firing of other contractors at TVA. For Mr. White to now contend that he is entitled to claim the protection against damage awards granted to a public servant under the doctrine of official immunity conveniently ignores his status as an independent contractor. The power demanded by and granted to Mr. White makes him an "independent" contractor in every sense of the term and, under existing Supreme Court authority, he is not entitled to claim the immunities otherwise available to TVA employees.

Defendants shrug off (as apparently have the lower courts) the well-established body of law cited by the plaintiff under which a contractor is allowed to claim the

immunity of the government with which it has contracted by the statement,

> ...the cases QTC cites (at 42) involve not the official immunity defense, but the so-called "Government contractor" defense, which has no relevance here at all. Appellee's Brief at p. 28.

What are these defendants if they are not "Government Contractors?" The services of all these defendants were supplied under Personal Service Contracts between SWEC and TVA that were signed on January 3, 1986. Great care was taken to specify in writing that White was an independent contractor and was not to be considered a federal employee, or even a Special Government employee, for any purpose. The defendants demanded and got payment for White's services several times over the maximum annual pay allowed to any federal employee, including the President of the United

States.[6] The defendants demanded and got for White more power and authority than was generally allowed any federal employee in the position he assumed.[7] White continued to draw his Naval retirement pension throughout his assignment to TVA. The fact that these defendants induced TVA to enter into a contract with terms that allowed White to exercise the discretion of a government official does not change the fact that the defendants were clearly government contractors. This Court has previously ruled in another context that simply because a defendant "acts like" a

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[6] Annual pay of $355,200.00 plus expenses plus a 10% surcharge to SWEC on the services provided to TVA by BETA (as requested by White) at a rate of $127.50 per hour.

[7] This was specifically in the area of control over the NSRS, which had been an independent safety organization reporting directly to the TVA Board and the TVA organization under which QTC operated, as well as with respect to procurement, personnel, support services and related areas.

particular kind of immune person or body does not create an immunity that does not otherwise exist.[8]

It is the fact that TVA contracted out the discretionary function of an agency manager that led the trial court below into an erroneous focus on the "functional analysis" for official immunity without regard to White's status as a government contractor. The trial court's opinion is a discourse on the law of official immunity applicable to a federal employee and fails to reconcile an entire body of well-established case law that gives very clear guidance for when a government contractor

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[8] In Cleavinger v. Saxner, 474 U.S. 193 (1985), for example, the defendants were federal employees and prison officials who served as members of a federal prison's Institution of Discipline Committee that "acted like" a judicial body and therefore, sought the protection of absolute immunity granted to judges, prosecutors and parole boards. This was denied and only qualified immunity granted to the defendants.

can and cannot claim immunity. These defendants wanted the money commanded by a government contractor without the restrictions applicable to federal employees, but they wanted this coupled with the power and authority generally allowed only to a government official. They needed for White to have the authority of a government official to achieve their illegal purposes most efficiently. Now that a victim of defendants illegal actions (not only tortious) seeks redress, these defendants want to further shield their accountability by claiming the rights of a civil servant.

Where is the defendants' case citation to support a grant of immunity to an independent contractor who was not a "special Government employee," and who was given complete discretion in the operation of a department of a government agency with

respect to its dealings with other government contractors? In all of the cases cited by the defendants and relied upon by the trial court the person found to be immune was either an outright federal employee or a "special Government employee" or was an occasional government employee assigned to perform a specific task according to a specific government-established protocol or acted under authority of a statutorily created principle/agent relationship.[9] Where are

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[9] Defendant's references to Vest v. Waring, 565 F. Supp. 674 (N.D. Ga. 1983) (Brief at pp. 26 and 31) appear to indicate the holdings that granted immunity in that case applied to persons who were not clearly federal employees, but this is not the case. Defendants must have overlooked the very clear distinction made between the full-time (NEI) and the part-time (NAEC) federal employees who were granted immunity and the private sector defendants who were not allowed to claim immunity, despite the fact they were paid by the NEI to perform the subject research. The private defendants argued they should also be immune from the Sherman Act because they were "instrumentalities" of the NEI and were

the cites to statutes, regulations and legislative history under which White or any of the other defendants in this case can lay claim to official immunity? TVA's general authority to enter into contracts would not be sufficient. It is the lack of specific congressional authorization that

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"literally the hands and 'arms' used by the NEI to fulfill its research obligations and goals." In that case the trial court rightly concluded:

> A private agency, an organization, an individual or a group of persons can be federal "instrumentalities" only to the extent that there is a clearly expressed Congressional intent to create a "principal/agent" relationship between the government and these private parties. In other words, one cannot call himself an "instrumentality" or "arm" of the government merely because he believes himself to be, or even because he happens to be, fulfilling a legitimate governmental purpose. Rather, the extent to which a private entity can be deemed to be acting on behalf of or in the place of the federal government can be determined only by a careful examination of the relevant federal statutes and regulations, and the available legislative history. Id. at 686.

led the U.S. Comptroller General to find the contracts to be improper.

There are statutory provisions passed by Congress to allow private contractors to act for the government. For example, private contractors are authorized by statute to operate nuclear production facilities and carry out a federal mission, with federal property under the direction and control of the DOE under 42 U.S.C. §§2061(b) and 2013(c). No such statute authorized Steven White to operate the nuclear program at TVA, and without Congressional authority he has no basis for asserting a claim for official immunity.

It is not entirely clear whether immunity would attach in all cases, even when such statutory authority to act for the government exists. In Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) this Court was faced with the issue of whether a

state worker's compensation provision could be enforced against Goodyear for an injury to a worker at a DOE facility operated under contract by Goodyear. The Court recognized that the rule was established in Hancock v. Train, 426 U.S. 167, (1976) that "a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation" 108 S. Ct. at 1710. But immediately thereafter the Court states:

> In this case, however, we are not presented with a direct state regulation of the operation of the Portsmouth facility. Rather, the case involves the imposition of a supplemental award of workers' compensation chargeable against Goodyear, for an injury caused by Goodyear's failure to comply with a state safety regulation. Appellant and the Solicitor General argue that the application of the Ohio additional award provision is nonetheless

> tantamount to a regulation of the Portsmouth facility and thus invalid under the Supremacy clause. We need not decide this issue, however, for we conclude...[that Congress has authorized]...application of the provision to workers at the Portsmouth facility. Id. (emphasis added)

This language indicates this Court's recognition that a private contractor's accountability to an injured party under state law is quite clearly a separate issue from the supremacy clause that prevents a state from attempting to regulate the manner in which a federal function is carried out. The court clearly recognized the distinction, but did not have to decide the issue to resolve the controversy of the case presented.

Whether the issue is immunity from tort liabilty as in Boyle v. United Technology, or immunity from anti-trust liability as in Vest v. Waring, or immunity from enforcement of state workers

compensation provisions as in Goodyear v. Miller, the fact that a private contractor is doing work for the government is not in and of itself sufficient to give that contractor immunity from a civil action. Simply because TVA gave Steven White the authority to act like a government official does not mean this Court has to grant him an immunity that is clearly not available to government contractors under well-established principles of law.[10]

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[10] TVA "cannot manufacture immunity for its employees [or contractors] by agreeing to indemnify them." Spruytle v. Walkers, 753 F.2d 498, 512 n. 6 (6th Cir. 1985). See also Brady v. Roosevelt Steamship Co., 317 U.S. 575 (1943). Are these defendants to be allowed to manufacture official immunity for themselves without legal authorization simply by inducing a three-member Board of Directors for TVA to enter into a Memorandum of Understanding that allows White to "act like" a federal employee?

B. Even if White were allowed some form of immunity, this should not extend to other defendant's nor shield all of the defendnats from liability for a wrongful conspiracy that began before White assumed any duties at TVA.

Even if the Court were to allow White immunity for actions he took once he assumed the position of manager of ONP at TVA, this immunity cannot be stretched backward to cover all the defendants from liability for the conspiracy that began before White assumed his duties. The trial court was in error to reject the evidence in this record that support QTC's contention that two conspiracies were begun in the early fall, one of which was to put QTC out of business at TVA and hopefully for good.[11] It is also reasonable to infer

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[11] Reasonable men may certainly differ with Judge Edgar's assessment of the weight of the evidence on this issue, even based only upon the circumstantial evidence already available in this record. There is certainly sufficient circumstantial evidence from which it may be inferred that a hidden agenda behind

that the process of interference was begun prior to January 13, 1986 and, indeed, we have Mr. Wegner stating to TVA counsel Bill Mason on January 3, 1986, that the defendants have a problem with "Qual Tech." and need to terminate that contract (J.A. 157). Mr. Wegner's statement to a DOL investigator to the effect that "QTC was a cancer that had to be dealt with" (Depo. Ex. 19) is evidence of the attitude of the defendants towards QTC and the intent to cut QTC out of TVA, even if the statement itself is held not to be actionable. And, although he now characterizes the quote with a different meaning, Mr. White does acknowledge his statement to the press that

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the defendant's insistence on White having management control over the NSRS and over the hiring and firing of all contractors was the defendant's plan to get rid of QTC. Evidence supporting plaintiff's contentions is specifically referenced in Appellant's Brief filed in the Court of Appeals at pp. 30-34.

"we made a conscious decision while we were in the contract negotiations" to phase QTC out (J.A. 1569 White pp. 166-171; J.A. 1745).

Even if White were allowed some type of immunity, this does not immunize defendant SWEC or defendant BETA for the tortious activity carried out by their other agents. It appears that the conspiracy was initially formulated by BETA and SWEC principals, agents and employees who later enlisted White into the conspiracy. White was not the only agent acting for the defendants, he was simply the one defendants were successful in placing in a position from which their goals could be effectuated. Surely this Court will not accept a contention that all the SWEC and BETA agents have official immunity simply because the defendants were successful in having the death blows to QTC

struck through the use of White acting as a TVA manager. Just because one member of a conspiracy may have immunity does not prevent the other conspirators from being held liable. It was clearly error for the trial court to dismiss the plaintiff's claims against the other defendants, even if White were accorded some form of immunity. Dennis v. Sparks, 449 U.S. 24, 28 101 S.Ct. 183, 186, 66 L.Ed 185 (1980). Macko v. Bryon, 641 F.2d 447, 449-50 (6th Cir. 1981); Hall v. United States, 704 F.2d 246, 252 (6th Cir. 1983).

II.

A GOVERNMENT CONTRACTOR WHO IS PERFORMING DISCRETIONARY ACTS THAT ARE IN VIOLATION OF 18 U.S.C. §208(a) SHOULD NOT BE ALLOWED TO CLAIM IMMUNITY WHEN THE ACTS COMPLAINED OF HAVE A DIRECT NEXUS TO THE SPECIFIC ACTS THAT VIOLATE §208(a)

Even if TVA can bestow the mantle of official immunity on White simply by allowing him to exercise governmental

power, that immunity surely cannot be stretched to provide cover to all the defendants nor can it immunize illegal acts. While "bad" motives do not defeat official immunity as long as the action complained of was within the outer parameter of the official's duties, illegal actions are always outside the authority of a government official. White's motives were more than simply "bad" they were illegal in that QTC was fired and the resulting work was given out to the other defendants in violation of 18 U.S.C. §208(a). The lower court erred in granting immunity to the defendants without regard to the illegality of the contracts under which White, and through him the other defendants, claim entitlement to official immunity. The lower court assumed the employment status of White was irrelevant and went right into the "functional

analysis" described. There is a presupposition by the Supreme Court, however, as stated in Forrester v. White , 484 U.S. 219 (1988) that the Court is examining the nature of "functions with which a particular official... has been lawfully entrusted." Id. at 5630 The function of firing QTC and hiring SWEC and BETA personnel to replace the QTC program was not a function "lawfully entrusted" to White because this is the very action that violates 18 U.S.C. §208(a).

The illegality of White's contractual arrangement specifically impacts this plaintiff as it may not have anyone else at TVA. QTC was fired and the work was given to the other defendants, and White (as STEMAR) even received a 10% surcharge for every hour Mr. Brodsky charged in January 1986 for the time he spent developing the program plan that defendants came up with

to replace QTC, including the time spent supervising the preparation of the letter reducing QTC's duties at TVA. (J.A. 976 Brodsky pp. 187, 399; J.A. C.Mason pp.46, 54,61; J.A. 1109 Denise I. pp. 81-82) There is a very direct connection between White's conflict-of-interest and the injury done to the plaintiff.

In United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961) this Court ruled that a contract entered into in violation of the conflict of interest statute is void and unenforceable as matter of public policy, even if the party seeking enforcement of the contract ostensibly appears entirely innocent. Yet, here, the Trial Court has allowed these defendants a claim of governmental immunity when the very contract terms under which White is given the power to fire QTC and hire defendants SWEC and BETA to do the work

instead is in direct contravention of 18 U.S.C. §208(a).

The sound reasons for the prohibition against serving two masters is clearly illustrated in this case. Was White serving his master SWEC or his master TVA when he took action to suddenly disrupt an ongoing program that had been approved by the NRC without having an alternative program in place? Which master was he serving when he terminated QTC and the ERT program and gave many hours of contract work to the other defendants (and a percentage to himself as well for BETA hours) to devise a <u>new</u> program for completion of the Watts Bar concerns and also to give advisory support on the ECP program? Which master was he serving when the contracts between SWEC and TVA for support services to ONP grew from the 16 million maximum estimated in early January

1986 to the almost $200 million in contracts in effect by the time Mr. White left TVA in October 1988?

The defendants have thus far retained the financial benefit of their illegal contracts. To then also allow the defendants the added benefit of granting them the immunity of government officials on top of all their illegal profits makes a mockery of the conflict-of-interest laws, the federal pay cap statutes and the rights of other government contractors.

III.

THE LOWER COURT DEPARTED FROM ESTABLISHED PRECEDENT BY GRANTING QUALIFIED IMMUNITY TO ALL DEFENDANTS WHEN THERE IS EVIDENCE THE DEFENDANTS TERMINATED PLAINTIFF'S EMPLOYMENT FOR PRETEXTUAL REASONS AND BY A METHOD OF PUBLICLY DISSEMINATING FALSE INFORMATION ABOUT THE PLAINTIFF IN CONNECTION WITH THE TERMINATION FROM GOVERNMENT EMPLOYMENT THAT HAS RESULTED IN INJURY TO THE PLAINTIFF?

It is well-established that a public official has only a qualified immunity against a claim under Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). The test by which an official's conduct is to be measured to determine whether the qualified immunity exists for the acts complained of was modified and re-established in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Under the Harlow test, the actions complained of are examined to determine whether a clearly established right has been violated, and if the right was clearly established, the defense of qualified immunity fails. The

defendant's good faith belief that his actions were lawful is irrelevant under Harlow, and the existence of the qualified immunity is purely a legal question to be determined by the trial court prior to trial. Donta v. Hooper, 774 F.2d 716 (6th Cir. 1985).

In reviewing the record as a whole, it is clear that the Trial Court erred in granting qualified immunity to all defendants on plaintiff's Constitutional tort claim. As the Trial Court stated, plaintiff's "property" interest extended to those services actually requested by TVA (Memorandum Opinion, Appendix at p. 50). What the Trial Court failed to appreciate, however, was that the implementation and operation of the ERT program as delineated in Procedure 0307 (J.A. 1764) had already been requested by TVA and investigations had already been assigned by NSRS to QTC

when the defendant cut the whole program short and stopped QTC from performing any further investigations (other than certain I&H complaints) and the entire process of feedback to the employees that had already been requested and was part of the written procedures of the program was ended. (J.A. 1424 Thero pp. 338-339). The ERT was an established program with clearly delineated services already being performed and an established measure for when those services were considered completed. Also, with the ECP contract, services had already been requested and a schedule into the future established by TVA when defendants suddenly cut QTC out of that program as well. (J.A. 1417 Thero p. 291). Plaintiff, therefore, does have evidence of violation of a property right in that defendants terminated QTC's completion of already-requested services under both contracts.

The violation of plaintiffs protected liberty interests by defendants' pretextual firing of QTC and the public dissemination of false information in connection with the termination from public employment is even more obvious.

In Wisconsin v. Constantineau, 400 U.S. 422 (1971) the Supreme Court held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," constitutional protections are required. Id. at 437. In discussing this and other cases the Supreme Court later clarified in Paul v. Davis, 424 U.S. 693 (1976) that an injury to reputation alone, apart from some more tangible interests such as loss of employment, does not implicate any protected liberty or property interests. From Paul v. Davis came the "stigma plus" test for determining the existence of a

protected liberty interest and reaffirmation that defamation by a public official in connection with a termination of employment is an injury to a constitutionally protected liberty interest.

The lower court properly recognized that the test applied in the Sixth Court for determining whether a challenged termination results in a violation of plaintiff's liberty interest is whether the challenged action involves "the voluntary public dissemination of false information in the course of a decision to terminate...employment" quoting from Burkhart v. Randles, 764 F.2d 1196, 1201 (6th Cir. 1985) and also citing Kendall v. Board of Ed. of Memphis City Sch., 627 F.2d 15 (6th Cir. 1980). (Memorandum, Opinion Appendix at p. 60) Then, however, the Court failed to follow precedent and

instead commenced a review of cases from other Circuits to examine just how slanderous the false information has to be to constitute a violation of plaintiff's liberty interest. The lower court has ignored its own established authority. For instance, in Windsor v. The Tennessean, 719 F.2d 155 (6th Cir. 1983) the Court found no protected property interest because the plaintiff had no legal entitlement to continued employment. The Court also ruled that no liberty interest was shown in that case, but in doing so stated:

> ...Such an interest could arise if false reasons for the discharge were publicly disseminated, thus stigmatizing Windsor and foreclosing other employment opportunities...Windsor does not allege, however, that the reasons for the discharge were publicly disclosed. Id. at 159.

The evidence in the record as a whole most certainly supports plaintiff's claim of a violation of a liberty interest. Plaintiff

has produced ample evidence that the public charges against it by White were false. Plaintiffs have also produced specific evidence that the damage to plaintiff's reputation resulting from the defendants' action in publicly disseminating false information in the course of QTC's termination from TVA has prevented QTC from obtaining further employment. The trial court discounted the weight of Mrs. Garde's affidavit on this issue, but apparently overlooked paragraph 14 of Mr. Theoro's affidavit of March 11, 1988 (JA 163). Plaintiff has produced evidence that QTC has been unable to obtain any new jobs since leaving TVA despite diligent efforts, and also evidence of specific rejection because of the events at TVA and the reputation defendants have fashioned for QTC. (J.A. 163; J.A. 155)

The Court has apparently overlooked the evidence that QTC's termination was entirely pretextual in nature and the false reasons publicly disseminated by the defendants were given out with the intention of discrediting QTC's endeavors at TVA as well as QTC's competitive approach for assisting nuclear plants in the identification of potential safety problems. There is direct evidence as well as inferences that may certainly be drawn that the defendants wanted to discredit QTC and disrupt the ERT program for their own business purposes and also so that they could minimize the safety problems at TVA that were coming to light through the ERT program. The defendants needed to shut the QTC program down so they could cover up the extent of the safety problems at TVA and get the nuclear power program up and

running again.[12] They also needed to shut down the flow of information from TVA to the NRC that was coming through the ERT program at Watts Bar because this was causing "problems" of heightened inspections by the NRC at other nuclear plants where defendants were working with utilities in the private sector.

Defendants certainly cannot say they were unaware that firing QTC to silence the flow of information and the reporting of nuclear safety issues was a violation of a known right in view of 42 U.S.C. §5851(a), a "whistle-blowers" statute that protects

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[12] Indeed in March 1986 Steven White wrote a letter to the NRC assuring the regulatory agency that there had been no pervasive breakdown in TVA's quality assurance program and made subsequent representations to the NRC that reported safety concerns had been greatly exaggerated. This led to an investigation by the NRC of what is referred to as White's "material false statements" that resulted in a citation being issued to TVA because of the material false statements.

persons who report nuclear safety concerns or violations.

Surely the combined effects of pretextual firing from government employment that was intended to punish the plaintiff and silence the reporting of nuclear safety issues to the NRC, that is also accompanied by the deliberate dissemination of false statements in connection with the termination from public employment that has so stigmatized QTC as to put the plaintiff out of business is more than enough to create a liberty interest in QTC that was violated by the defendants.

CONCLUSION

While the situation of a government agency contracting out a line management position may be an unusual occurrence, it is one that can recur and the chances for abuse are great. This is of particular

concern with respect to TVA (an agency that has long bemoaned the restrictions presented by the federal pay cap) since defense counsel are themselves members of the TVA Office of General Counsel and persist in the position that the contractual arrangements with the defendants in this case were entirely in order. They seem to have difficulty comprehending the existence of a conflict-of-interest under 208(a). (See Appellee's Brief at p. 32) The position apparently taken by TVA, as well as the defendants in this case, is that a government agency can delegate the right to violate 18 U.S.C. §208(a) to a private party by simply making a specious ruling under 208(b) and anyone harmed by action that would otherwise be prohibited by 208(a) has no standing to complain since 208(a) is a criminal statue that is meant only to protect the

government. Additionally, the defendants have taken the position that as long as the TVA Board grants the authority, government contractors can exercise the discretion of the government without specific authority from Congress, and then shield their actions from accountability by claiming official immunity from civil liabilty to one who is harmed as a result of their discretionary and wrongful actions. Such a disregard for the power reserved to Congress, for federal statutes and for the case law established by this Court cannot be allowed to stand to the detriment of a citizen injured by the actions of other citizens.

Respectfully submitted,

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